

paid, which I hold it was not, the plaintiff can at the best only be entitled to its return.

Judgment will be entered for the defendant with costs.

Claim dismissed.

Solicitors: S. M. Sharma; Das & Co.

**M. K. RAMASAMY PILLAI v. O. RM. M. SP. SU.
MEYAPPA CHETTIAR & ANOR.**

[A. C. J. (Thomson J.) March 9, 1955]

[Ipoh—Civil Appeal No. 12 of 1954]

Landlord and Tenant—Control of Rent Ordinance, 1948, s. 15—Bankruptcy of tenant—Whether Official Assignee became statutory tenant after termination of notice to quit—Meaning of statutory tenant.

The relevant facts in this case were shortly as follows:— The appellant was the tenant of premises which were subject to the provisions of the Control of Rent Ordinance, 1948. He was adjudicated bankrupt on October 26, 1953 and thereafter his rights under the contract of tenancy passed by virtue of the bankruptcy law to the Official Assignee. The appellant continued in occupation of the premises with the Official Assignee's permission. On December 30, 1953 the landlord's solicitors gave the Official Assignee a month's notice to quit the premises. The Official Assignee did not reply to the notice and the appellant remained in occupation of the premises. On March 11, 1954 the landlord commenced proceedings in the Sessions Court against the Official Assignee as the 1st defendant and the appellant as 2nd defendant in which he claimed vacant possession of the premises and mesne profits. At the hearing the Official Assignee appeared and informed the Court that he neither opposed nor admitted the claim and the trial proceeded on this basis. Judgment was given against the appellant for possession of the premises. The appellant appealed.

Held: (1) the Official Assignee could only have become a statutory tenant if he had remained in possession of the premises after the determination of his tenancy; (2) on the facts in this case the Official Assignee did not remain in possession of the premises after the determination of his tenancy and accordingly he was at no time a statutory tenant within the meaning of s. 15 of the Control of Rent Ordinance, 1948; (3) as the Official Assignee did not become a statutory tenant, the appellant was in the position of a trespasser and therefore the landlord was entitled to possession against him.

Cases referred to:—

- (1) *Thyne v. Salmon* (1948) 1 K.B. 482.
- (2) *Reeves v. Davies* (1921) 2 K.B. 486, 490.
- (3) *Stafford v. Levy* (1946) 2 All E.R. 256.
- (4) *Mercantile Bank of India (Trustees) Ltd. v. Ruth Nicholas* (1949) M.L.J. 104.
- (5) *Brown v. Draper* (1944) 1 K.B. 309, 315.
- (6) *Haskins v. Lewis* (1931) 2 K.B. 1.
- (7) *Skinner v. Geary* (1931) 2 K.B. 546.
- (8) *Dando Ltd. v. Hitchcock & Anor.* (1954) 2 Q.B. 317.
- (9) *Hiller v. United Dairies (London) Ltd.* (1934) 1 K.B. 57.

CIVIL APPEAL.

S. P. Seenivasagam for the appellant.

W J. Huntsman for the 1st respondent.

Cur. Adv. Vult.

Thomson J. :— This is an appeal from a judgment of the President of the Sessions Court at Kuala Kangsar relating to the possession of premises at No. 49, Jalan Dato, Kuala Kangsar, of which the respondent to the present appeal is the proprietor and landlord.

The premises are apt to be subject to the provisions of the Control of Rent Ordinance, 1948, and at some time prior to November, 1952, the present appellant became a monthly tenant of them at a rent of \$80 per month payable in advance.

On 18th November, 1952, the landlord gave the appellant notice terminating his tenancy at 31st December next. There was considerable controversy at the trial as to what happened about this notice. The landlord said it had been withdrawn prior to its expiration. The appellant said it had never been withdrawn and that accordingly on its expiration on 31st December, 1952, he became a statutory tenant of the premises. In the event, however, the learned President found as a matter of fact that it had been withdrawn and that thereafter the appellant continued in occupation and continued to pay rent which the landlord accepted, and counsel for the appellant has conceded that against this finding of fact he is unable successfully to appeal.

On 26th October, 1953, the appellant was adjudicated bankrupt, the act of bankruptcy founded on having taken place on 21st January, 1953. On that event, though by virtue of the bankruptcy law his rights under his contract of tenancy passed to the Official Assignee, he remained in occupation of the premises with the Official Assignee's permission. On 18th December, 1953, solicitors for the landlord addressed a letter to the Official Assignee asking him to disclaim his interest in the premises. On 28th December, 1953, the Official Assignee replied to that letter stating that he did not "intend to disclaim the tenancy" and on 30th December, 1953, the landlord's solicitors gave him a month's notice to quit the premises. Apparently the Official Assignee did not reply to this notice and the appellant remained in occupation of the premises. Accordingly, on 11th March, 1954, the landlord commenced proceedings in the Sessions Court against the Official Assignee as first defendant and the appellant as second defendant in which he claimed vacant possession of the premises and mesne profits.

When the matter came on for hearing on 29th April, 1954, the Official Assignee appeared and

informed the Court that he neither opposed nor admitted the claim provided he was not required to pay any costs and the trial proceeded upon this basis, apparently with the consent of all parties.

In the event the learned President made no order as regards the Official Assignee and gave judgment against the appellant for possession of the premises, mesne profits and costs, but "without prejudice to the right of sub-tenant Lal Singh", a person who had apparently come into occupation of part of the premises at some time after the bankruptcy by permission of the appellant. Against this decision the appellant has now appealed and the landlord filed a cross appeal which, however, was later withdrawn against so much of it as relates to Lal Singh.

The proceedings in the Sessions Court took a somewhat confused course for which, I hasten to add, I consider counsel for the parties to be more responsible than the President and I do not think any useful purpose will be served by describing them in detail.

For the purposes of this appeal it must be accepted, in view of the findings of the President which have been mentioned, that when the appellant became bankrupt there was in existence a contract of tenancy between the landlord and him by virtue of which he was in occupation of the premises. On his bankruptcy his rights under the contract passed to the Official Assignee; no interest under the contract remained vested in him; and he did not become a statutory tenant under the Control of Rent Ordinance, 1948, for a statutory tenancy cannot arise while a contractual tenancy in respect of the same premises still exists. (See *Thyne v. Salmon*⁽¹⁾). Thereafter the only person who had any rights as a tenant was the Official Assignee. The appellant although in fact he remained in occupation of the premises only did so as his licensee. Without and apart from the licence of the Official Assignee he had "no more interest in the property than any passer-by in the street" (per Lord Sterndale, M.R. in *Reeves v. Davies*⁽²⁾).

When the contract of tenancy came to an end on the expiration of the notice to quit given to the Official Assignee by the landlord the appellant's position clearly depended on the position of the Official Assignee who, the contract being at an end, could then have no rights in the premises unless he became a statutory tenant under the Control of Rent Ordinance.

If the Official Assignee did not become a statutory tenant then the appellant was a trespasser. He could claim no licence to be on the premises because the Official Assignee was no longer entitled to give it and as a matter of law he did not himself become a statutory tenant. (See *Stafford v. Levy*⁽³⁾). If, on the other

hand, the Official Assignee became a statutory tenant on the expiration of the contract of tenancy and if his licence to the appellant to occupy the premises in fact continued then as against the landlord at any rate the appellant was entitled to remain. In that connection, I would refer to the local case of *The Mercantile Bank of India (Trustees) Ltd. v. Ruth Nicholas*⁽⁴⁾ and to the English case of *Brown v. Draper*⁽⁵⁾.

The whole case, then, depends on the question whether or not on the date of the institution of the present proceedings, that is 11th March, 1954, the Official Assignee was a statutory tenant of the premises within the meaning of section 15 of the Control of Rent Ordinance. If the Official Assignee was a statutory tenant then the appellant as his licensee was entitled to remain on the premises. If he was not a statutory tenant then the appellant was a trespasser and not entitled to the protection of the Ordinance. And, for reasons which I shall proceed to state, the question of whether the Official Assignee was a statutory tenant depends in this case in its turn on the question of whether he remained in possession of the premises after the determination of the contractual tenancy.

Section 15 of the Ordinance states what persons are statutory tenants under the Ordinance and apart from certain classes of sub-tenants which do not call for consideration in the present case a statutory tenant is :—

"Any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord."

In other words, (again apart from the question of sub-tenancy) before a person can claim to be a statutory tenant of premises four conditions must be fulfilled :—

- (a) he must have been a tenant of the premises;
- (b) his tenancy must have been determined, not assigned or anything of the sort;
- (c) he must have remained in possession of the premises after the determination of his tenancy; and
- (d) the provisions of the Ordinance must render him being deprived of possession by the landlord of the premises.

In the present case the Official Assignee fulfilled the first and second of these conditions and if he also fulfilled the third he clearly for the time being also fulfilled the fourth for it is admitted that rent was not in arrear at any material time and that the permission of the Rent Assessment Board for his ejectment had not been obtained. But did he fulfil the third condition? Did he remain in possession of the premises after the determination of the tenancy? That is a question of mixed law and fact and raises a question of the construction of the wording of the Section.

I propose to deal with that question of construction in the light of the English authorities for, in my opinion, there is no substance in the argument that because the English Acts do not contain any definition of a statutory tenant as does section 15 of our Ordinance there is thereby some material difference between the law here and the law in England. It is true that the English Acts do not formally define a "statutory tenant" although the expression has been used by the English Courts for very many years. But when it is remembered that the English Acts only apply to dwelling houses and do not provide for any preliminary proceedings before a tribunal corresponding to our Rent Assessment Board, I can find no material difference between the provisions of our section 15 and section 15 of the English Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which deals with the position of a "tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies". I can see no material distinction between such a tenant and "any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord".

I do not think it is necessary to go through the English authorities in detail. It will be sufficient if I say that I have examined a long series of them commencing with *Haskins v. Lewis*⁽⁶⁾ and *Skinner v. Geary*⁽⁷⁾ and ending with the latest available reported case on the subject which is *Dando Ltd. v. Hitchcock & Anor.*⁽⁸⁾ and am satisfied that it is well settled law that the English Acts only afford protection to a person who is in actual occupation of the premises and that the word "possession" in section 15(1) of the English Act of 1920 means actual possession and does not include any sort of constructive possession by a sub-tenant or assignee or licensee of the whole of the premises. It is true that there is another line of cases of which *Brown v. Draper*⁽⁵⁾, *supra* is one but as was pointed out by Denning L.J. in the case of *Dando Ltd. v. Hitchcock & Anor.*⁽⁸⁾, *supra*: "those cases are on a special footing". On that point His Lordship said:—

"Some reference was made to the husband and wife cases. It is well established that if a husband deserts his wife and leaves her in the house, the statutory tenancy does not come to an end. That is because of the particular relationship of husband and wife. The husband continues to occupy by his wife. She has an irrevocable authority from him to stay there. It remains the matrimonial home, though he is not living there. Those cases are on a special footing, and do not apply to this case."

I appreciate that our Ordinance applies to a much wider class of premises than do the English Acts. The English Acts only apply to dwelling houses. Our Ordinance applies to other classes of premises including

business premises. To my mind, however, this consideration does not detract in any way from the validity of the principle which I have deduced from the English authorities although it may in certain cases render its application more difficult than it would be in England. It is generally easy to decide whether a party is in occupation by way of residence whereas it may not be so easy to decide whether he is in occupation by way of carrying on business. An example of this may be found in the case of *Hiller v. United Dairies (London) Ltd.*⁽⁹⁾. That was a case where a limited company were leaseholders of a shop with living-rooms above in which their manager resided for the purposes of the business. On the expiration of the lease, the landlord claimed possession and the company claimed that they were protected by the Rent Acts as being in occupation by their manager. It was held that they were not protected on the ground that the principle of dwelling in the premises by an agent could not be admitted. If such a case were to arise in this country, it might well be held that by reason of our Ordinance applying to business premises the company and therefore the agent were protected. But whether the occupation be for purposes of residence or for wider purposes I see no reason in principle, on the English authorities, for holding otherwise than that there must be actual occupation before there can be possession within the meaning of section 15 of our Ordinance.

Applying that principle to the present case it is true that the question of whether the Official Assignee was in actual occupation of the premises is a question of fact. It is equally true that the learned President did not arrive at any finding regarding it, nor, indeed, did he even consider it for the simple reason that it neither occurred to him or was it suggested to him by counsel on either side. On reflection, however, I do not think that that raises any difficulty in the way of my disposing of the present appeal here and now. It may well be that there is some evidence in existence that was not produced at the trial or which could have been elicited from the Official Assignee when he gave evidence if he had been examined or cross-examined at greater length. That is beside the point. The landlord and the appellant were both represented by experienced counsel and they cannot complain if the case is decided only on such evidence as their counsel saw fit to lay before the Court.

On that evidence I can find nothing to shew that on 11th March, 1954, or at any other time the Official Assignee was in actual occupation of the premises. It is true that while the contract of tenancy was in existence he refused to disclaim it and from that it is

possible to infer that at one time he had some sort of *animus possidendi*. There is, however, not a scrap of evidence, although he was called as a witness at the trial and examined and cross-examined, to shew a single act on his part that could by any stretch of the imagination be construed as an act of occupation and even his *animus*, if he ever had any, had clearly disappeared before the commencement of the proceedings for his attitude throughout, which has been completely passive, is quite irreconcilable with the continued existence of any intention to occupy the premises or make use of them in any way.

I am thus compelled to the conclusion that the Official Assignee did not remain in possession of the premises after the determination of his tenancy so as to bring him within the scope of section 15 of the Ordinance and that accordingly he was at no time a statutory tenant within the meaning of the section. The appeal, therefore, fails and must be dismissed with costs. If there is a deposit in Court it must be paid out to the respondent and set off against his taxed costs.

Before departing from the case I feel that although I am not specifically concerned with the point, I should say something about so much of the order made in the Sessions Court as relates to the sub-tenant Lal Singh. If this man came into occupation of the premises by virtue of a sub-tenancy created in his favour by anybody entitled to do so he will be entitled to the protection of the Control of Rent Ordinance but that raises a question which will have to be decided in proceedings to which he is a party.

Appeal dismissed

Solicitors : S. Seenivasagam & Sons; Maxwell, Kenion,
Cowdy & Jones.

In re J. B. YOUNG, DECD.;
J. C. WITT & ANOR. v. COLLECTOR OF
ESTATE DUTY

[C. A. (Mathew C.J., Murray-Aynsley C.J., (S) and Bellamy J.) January 20, 1955]

[K. L. — F. M. Civil Appeal No. 11 of 1954]

Estate Duty Enactment, 1941 — Private limited company — Valuation of shares on death of shareholder.

The main question raised on this appeal was the value of the ordinary shares of Boustead & Co. Ltd., a private company registered in Malaya, on February 4, 1948 the date of the death of the deceased. At the trial the learned Judge fixed the value at \$150. The appellant appealed against this finding.

Held: (1) in estimating the value of the share the Court must take into consideration every advantage and

disadvantage to the company and every benefit and clog attaching to the shares as well as the nature of the particular company; (2) in the special circumstances of the private company in this case no normal investor would be prepared to pay more than \$100 for a share and therefore the value to be placed on the shares for the purpose of estate duty should be \$100.

Cases referred to:—

- (1) *Smyth v. Revenue Commissioners* (1931) Ir. R. 643.
- (2) *Attorney-General Ceylon v. Mackie* (1952) 2 All E.R. 775.
- (3) *Inland Revenue Commissioners v. Crossman* (1937) A.C. 26.
- (4) *Borland's Trustees v. Steel Brothers & Co.* (1901) 1 Ch. 279.
- (5) *Attorney-General v. Jameson* (1905) 2 Ir. R. 218.
- (6) *In re Holt* (1953) 1 W.L.R. 1488; (1953) 2 All E.R. 1499.
- (7) *Re Hogg Decd.* (1939) M.L.J. 139; (1939) S.S.L.R. 9.

In addition to cases referred to, the following were also cited in argument: *Dale & Plant Ltd.* (1890) 43 Ch. D. 255; *Hickman & Kent* (1915) 1 Ch. 881; *Beattie v. Beattie* (1938) 1 Ch. 708; *In re New British Iron Co.* (1898) 1 Ch. 324; *In re Anglo Austrian Printing & Publishing Union* (1892) 2 Ch. 158; *Nell v. Atlanta Gold & Silver Consolidated Mines* 11 T.L.R. 407; *Salvesen's Trustees v. Commissioner of Inland Revenue* (1930) S.L.T. 387.

COURT OF APPEAL, from the decision of Wilson J. reported *sub nomine*, *In re Jasper Bertram Young, Decd.* (1954) M.L.J. 78.

A. F. Thorne (Morris Edgar with him) for the appellant: After dealing with the past history of Boustead & Co. Ltd. said that on February 11, 1947 the Company bought the London business and partnership was dissolved. On July 21, 1947 a new set of Articles of Association of the Company was adopted. The financial year of the Company was from the end of February to the end of February and the year here concerned with was the year from March 1, 1947 to February 29, 1948. J. B. Young died on February 4, 1948. Profit and loss account and balance sheet as on February 29, 1948 was the one it was agreed should count. At his death J. B. Young was the owner of 2,500 shares in the Company of a par value of \$100. There was also his remuneration as director of the Company and "additional remuneration."

Counsel submitted that section 20 of the Estate Duty Enactment, 1941 applied, and as deceased was not in control of the Company, section 11 did not apply.